THE LIABILITY OF A COUNTY FOR TORTS. — There has been much confusion as to municipal liability for torts. The general rule is that a city is liable for personal injury caused by the negligent act of an employee or agent engaged in the exercise of duties for local benefit, while if the injury is a result of the performance of duties of a purely public nature the city is not liable.[1] The courts reason that a city is a municipal corporation proper, created for certain self-interested purposes at the request of its citizens, and therefore, like any other corporation, under an implied liability for torts, except where its agents are carrying out some duty which is imposed on the city by the legislature or by law purely for the benefit of the general public, and from which the city, as such, acquires no profit.[2]

A county, on the other hand, cannot generally be held liable for torts.[3] The county is not a municipal corporation proper; rather, it is an arm of the sovereign power — a political subdivision of the state, created by the legislature for the purpose of a more convenient and distributive administration of government, and clothed with some of the attributes of sovereignty, exercising its functions, not by vote or direction of its inhabitants, but simply by command of the legislature which created it.[4] Therefore, since it is a branch of the sovereign power, it cannot usually be held liable to one injured by the negligence of its employees while they are performing the duties enjoined upon it. Thus, a county is not liable for an injury to a traveller resulting from the exercise of its statutory duty to repair a road.[5] But where the result of the negligence is a direct injury to property rights, as where mud, water, or other material is dumped on the land of a private person, it is impossible to exempt the county from liability without violating the constitutional provision against taking property without compensation.[6] The distinction thus taken is sound, for even a branch of the sovereign power cannot be created free from liability for the violation of the constitutional rights of individuals.[7] The sole remaining objection to liability, that the inhabitants of the county cannot be made to satisfy the judgment, is no longer of weight, because the liability will fall on the county fund and not on the estates of individuals.[8]

In a recent case a county employee, while engaged in repairing a road, negligently diverted a water-course, thereby causing the collapse of a bank of earth and rocks which poured on the plaintiff's land and destroyed his house. The county was held liable on the ground that there is no difference between the liability of municipalities and counties. *Matsumura* v. *County of Hawaii*, 19 Haw. 18. Although the court reached the right result, it failed

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[1] Rhobidas *v.* Concord, 70 N. H. 90; Hill *v.* Boston, 122 Mass. 344. See also 19 HARV. L. REV. 65.

[2] Hill *v.* Boston, *supra;* Howard *v.* Worcester, 153 Mass. 426; Murtaugh *v.* St. Louis, 44 Mo. 479.

[3] Fry *v.* County of Albemarle, 86 Va. 195; Com'rs of Hamilton County *v.* Mighels, 7 Oh. St. 109; 7 Am. & Eng. Encyc. L. 947.

[4] Downing *v.* Mason County, 87 Ky. 208; Smith *v.* Carlton County Com'rs, 46 Fed. 340.

[5] White *v.* Com'rs of Chowan, 90 N. C. 437; Barnett *v.* Contra Costa County, 67 Cal. 77. These cases represent the great weight of authority. A different view has prevailed in Maryland, Pennsylvania, and Iowa. It is believed that in the latter state the doctrine is weakening. See Packard *v.* Voltz, 94 Ia. 277.

[6] Eaton *v.* B. C. & M. R. R., 51 N. H. 504; Gilman *v.* Laconia, 55 N. H. 130, 131.

[7] It is this principle that makes a county liable for infringement of patent rights. May *v.* Logan County, 30 Fed. 250.

[8] In a famous English case the court denied liability because there was no corporate fund. Russell *v.* Men of Devon, 2 T. R. 667. The case has been often followed without reference to this difference between modern and ancient counties.

to draw the proper distinction between cities and counties. One is a local organization exercising many private and some public duties; the other is a public and political subdivision of the state, exercising public duties, and generally exempt from liability except where constitutional rights would be infringed by the exemption.

THE EFFECT OF INTENT ON SURRENDERS BY OPERATION OF LAW. — When a lessee of an unexpired term takes from his landlord a new valid lease of the same premises, the English courts hold that as a rule of law the act itself amounts to a surrender of the old term irrespective of any intention of the parties.[1] Such a surrender is necessary in order that the prior term may merge in the reversion, and without that merger the landlord cannot make a valid new lease. By accepting the new lease the tenant recognizes the landlord's power to grant it, and this he is afterwards estopped to deny. In the United States, however, there is a distinct tendency to modify the rule by inquiring into the probable intent of the parties. Thus, where covenants in the original leases ensuring to the lessee the right to recover the value of his fixtures were lacking in the new leases, there was held to be no surrender, on the ground that the lessee could not be held to have intended to deprive himself of the protection of the covenants.[2] This milder American view derives support from the many English decisions in one class of cases which do regard the probable intention of the parties. For it is universally held that there is no surrender unless the new lease to the lessee is valid according to its terms.[3] Although the English courts in reaching this result seem somewhat inconsistent, any other, in forcing the lessee to give up a valid existing lease for one which he could not enjoy, would be manifestly unjust.

But where the new invalid lease is to a stranger it might be urged that the usual rule might be applied, since the injustice to the old lessee would not result, as he has no interest in the validity of the new lease. In a recent case the lessee in the new void lease was a *cestui que trust* of the original lease. It was held that the old lease to his trustee was not surrendered. *Zick* v. *London United Tramways, Ltd.*, [1908] 2 K. B. 126. Although legally the two lessees are different persons, yet in both leases the real party in interest is the same, and it obviously could not have been the *cestui's* intention to allow his trustee to surrender the old term when the new lease to himself was void. However, where the party in interest is in fact different, what authority there is tends the same way.[4] For, while the tenant may have no concern in the validity of a new lease to a stranger, the interest of the landlord is the same no matter to whom the new lease runs. He cannot intend that a new void lease should involve an actual surrender of the original lease, since that would leave him without any hold over either other party. And since the landlord must be considered equally with the tenant, his intention

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[1] Parke, B., in Lyon *v.* Reed, 13 M. & W. 285.

[2] Van Rensselaer's Heirs *v.* Penniman, 6 Wend. (N. Y.) 579; Flagg *v.* Dow, 99 Mass. 18; Thomas *v.* Zumbalem, 43 Mo. 471.

[3] Wilson *v.* Sir Thos. Sewell, 4 Burr. 1975, 1980; Davison *v.* Stanley, 4 Burr. 2210; Roe d. Earl of Berkeley *v.* Archbishop of York, 6 East 86, 104; Doe d. Biddulph *v.* Poole, 11 Q. B. 713, 720; Smith *v.* Kerr, 108 N. Y. 31.

[4] Schieffelin *v.* Carpenter, 15 Wend. (N. Y.) 400. See also Whitney *v.* Meyers, 1 Duer (N. Y.) 266.